82-1101

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SENTINEL FINANCIAL INSTRUMENTS
and MICHAEL M. SENFT,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Under this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), does a person who would be protected by the Fifth Amendment from compulsory production of documents of his sole proprietorship business, lose that protection because he has chosen to make the business in form a limited partnership for the sole purpose of giving his minor child and younger brother gifts of 1% of the business' profits?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sentinel Financial Instruments ("SFI") and Michael M. Senft respectfully request that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered on December 15, 1982, affirming the order of the United States District Court for the Southern District of New York denying petitioners' motion to quash a grand jury subpoena addressed to petitioners' law firm and seeking SFI documents.

Opinions Below

The summary order of the Court of Appeals for the Second Circuit is unreported and appears in Appendix A hereto. The opinion of the District Court for the Southern District of New York is also unreported and appears in Appendix B hereto.

Jurisdiction

The summary order of the Court of Appeals for the Second Circuit was filed on December 15, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 17(c) of the Federal Rules of Criminal Procedure provides:

> (c) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, docu-

ments or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Statement of the Case

Petitioner SFI is a New York limited partnership that acts primarily as a broker and dealer in government securities. SFI's only general partner is petitioner Michael M. Senft, who upon SFI's formation in July 1979 made an initial contribution to SFI's capital of $49,500 and who owns a 98% interest in its profits and losses.

SFI has two limited partners. One limited partner is the Jennifer E. Senft Trust (the "Trust"), a trust established by Mr. Senft for his minor child. The Trust's only trustee is Burton G. Lipsky, Esq., an attorney who is also Mr. Senft's personal attorney. Mr. Senft gave the Trust a gift of $500, which the Trust used in July 1979 to make its only capital contribution to SFI ($500 being approximately 1% of SFI's then estimated net worth). The Trust is entitled to 1% of SFI's profits (and is not liable for any of SFI's losses beyond the amount of the Trust's $500 capital contribution). The Trust's only other assets are an interest in a term life insurance policy on Mr. Senft's life and investments it has made from the proceeds of its 1% income interest in SFI.

The other limited partner is Michael Senft's younger brother, David. David Senft's only capital contribution to SFI, made in June 1980, was $10,000 (approximately 1% of SFI's then estimated net worth); the money for this capital contribution

was loaned (interest free) to David by his brother Michael. David Senft has never repaid this loan, and no demand has ever been made for repayment. David Senft's limited partnership interest in SFI entitles him to 1% of SFI's profits (and he is not liable for any of SFI's losses beyond the amount of his capital contribution).

These 1% interests are the only interests of the Trust and David Senft in SFI. As limited partners, they have no authority concerning how SFI is operated. Michael Senft has sole managerial control over SFI, and he alone is responsible for all its policy decisions. The small limited partnership interests held by the Trust and by David Senft are nothing more than gifts of a small portion of SFI's profits bestowed by Michael Senft on his daughter and his brother.

In July 1982, the government served on SFI and on Wachtell, Lipton, Rosen & Katz ("Wachtell, Lipton"), attorneys for Mr. Senft and SFI, grand jury subpoenas calling for production of certain SFI documents.[1] The government had earlier informed Wachtell, Lipton that Mr. Senft and SFI are targets of the grand jury's investigation.

Prior to the issuance of the subpoena in question here, the SFI documents called for by that subpoena had been in the possession of an SFI employee who had allegedly been instructed by another SFI employee, acting without Mr. Senft's knowledge, to destroy them but had failed to do so. While continuing to be employed by SFI, the employee maintained possession of the documents, again without the knowledge of Mr. Senft or anyone else at SFI. When the SFI employee's possession of the documents was made known to Mr. Senft,

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1 The subpoena addressed to Wachtell, Lipton asks for production of "[a]ny and all Sentinel Financial Instruments documents pertaining to transactions between Sentinel Financial Instruments and Jesco & Associates for 1980." The subpoena addressed to SFI asks for production of "[a]ll Sentinel Financial Instruments (1) Customer trading sheets; (2) Records known internally as 'green sheets.' "

attorneys acting on Mr. Senft's behalf requested the employee to return the documents to Mr. Senft's attorneys for the sole purpose of their rendering legal advice to Mr. Senft. The SFI employee accordingly returned the documents to the attorneys, who were Mr. Senft's representatives, months before the subpoena at issue here was served.

A. Proceedings in the District Court

On August 6, 1982, Mr. Senft and SFI moved in the District Court to quash the grand jury subpoenas, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, on the ground that requiring production of the documents called for would violate Mr. Senft's Fifth Amendment privilege against compulsory self-incrimination. Petitioners and the government both submitted affidavits and briefs to the District Court in support of their respective positions.

On October 18, 1982, the District Court denied the motion to quash, holding that SFI "has an established institutional identity separate from its individual partners" and therefore should be treated for Fifth Amendment purposes like a corporation (which has no Fifth Amendment privilege), rather than like a sole proprietorship (which does). The District Court "relied on a factual examination of organizational activity, rather than focusing on the extent and nature of the ownership group"—as had been urged below by the petitioners—"to determine if the records of a small family partnership may be protected by the Fifth Amendment privilege." The District Court ruled that SFI documents are not privileged while in Mr. Senft's possession and, therefore, they are not privileged in the hands of Mr. Senft's attorneys. Accordingly, the District Court refused to quash the subpoena addressed to Wachtell, Lipton.

B. Proceedings in the Court of Appeals

On October 29, 1982, petitioners filed a notice of appeal from that portion of the District Court's order refusing to

quash the grand jury subpoena addressed to Wachtell, Lipton.[2] Thereafter, the government requested expedited treatment of the appeal, which petitioners did not oppose and which the Court of Appeals granted. After full briefing by the parties, but without hearing oral argument, the Court of Appeals filed a summary order on December 15, 1982, affirming the decision of the District Court. In its summary order, the Court of Appeals stated that SFI "clearly had an institutional identity separate and distinct from Michael Senft." Without addressing the District Court's failure to make an inquiry as to whether the subpoenaed documents were held by Mr. Senft in a representative capacity—as clearly required by this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (1974)—the Court of Appeals conclusorily stated that Mr. Senft "controlled the records in his representative capacity as a general partner of [SFI]. He had no personal right to possession or control of the documents." The Court of Appeals concluded that Mr. Senft could not assert his Fifth Amendment privilege against self-incrimination to bar production of the subpoenaed documents.

On December 17, the government moved in the Court of Appeals for issuance of the mandate forthwith. Petitioners cross-moved for a stay of the mandate pending their application for a writ of certiorari. On December 28, 1982 the Court of Appeals denied both motions.

* * *

As the foregoing facts reveal, SFI is a business that in virtually every respect is operated as a sole proprietorship of its principal, petitioner Michael M. Senft. Because, however, of

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2 Petitioners' decision to pursue an appeal only from the refusal to quash the subpoena addressed to Wachtell, Lipton was made in light of the settled law of the Second Circuit that the target of a grand jury investigation does not have a right of appeal from the denial of a motion to quash a subpoena directed to the target, *see In re Grand Jury Subpoena for New York State Income Tax Records*, 607 F.2d 566, 569 (2d Cir. 1979), but does have such a right with respect to the denial of a motion to quash a subpoena addressed to a third party, *id.* at 570.

Mr. Senft's desire to bestow gifts on two members of his immediate family—his minor child and his younger brother—SFI is in form a limited partnership. This form has no effect on the substance of SFI's business or the manner in which it is operated, and confers no business or other monetary benefit on Mr. Senft; its only effect is to allow Mr. Senft's brother and a trust for Mr. Senft's child each to receive gifts of 1% of SFI's profits. If SFI were in form a sole proprietorship, as it is in substance, there would be no question that Mr. Senft would have the right to assert his Fifth Amendment privilege for SFI documents. The issue presented by this petition is whether the District Court and Court of Appeals misapplied this Court's holding in *Bellis* v. *United States*, 417 U.S. 85 (1974), by unduly emphasizing the separate institutional identity of SFI and failing to make a detailed factual inquiry as to whether Mr. Senft held the subpoenaed documents in a representative capacity.

Reasons for Granting the Writ

The courts below failed to follow the analysis required by this Court in *Bellis* v. *United States* in determining that Mr. Senft could not assert his Fifth Amendment privilege with respect to the subpoenaed documents.

This Court has repeatedly recognized the appropriateness of exercising its certiorari jurisdiction in cases where the lower federal courts have misapplied or misconstrued decisions of this Court that are deemed to be "controlling" with regard to the petitioner's case. *See, e.g., New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 570-71 (1979); *Wilson* v. *Schnettler*, 365 U.S. 381, 383 (1961). In the case at bar, petitioners submit, both the District Court and Court of Appeals misapplied this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), which, as both petitioners and respondent argued below, controls the disposition of this case. Moreover, this case raises the important question of when, if ever, the Fifth Amendment privilege may protect partnership documents. Accordingly, this

is a compelling case for the exercise of this Court's certiorari jurisdiction.

In *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court held that an attorney who has possession of his client's documents for the purposes of rendering legal advice is not required to produce those documents pursuant to a subpoena if " 'the client himself would be privileged from production of the document, either as a party at common law . . . or as exempt from self-incrimination.' " *Id.* at 404-05 (quoting 8 J. Wigmore, *Evidence* § 2307, at 592 (McNaughton ed. 1961)). Accordingly, since the documents called for by the grand jury subpoena addressed to Wachtell, Lipton were transferred to Mr. Senft's attorneys for the purpose of obtaining legal advice, the government's ability to compel production of these documents—which are all records of SFI—turns on whether they were privileged from production while in Mr. Senft's possession. *See In re Katz*, 623 F.2d 122, 126 (2d Cir. 1980).[3]

The decisions of this Court and the lower federal courts recognize a bright-line rule distinguishing corporate records from records of a sole proprietorship as far as the applicability of the Fifth Amendment privilege is concerned: the privilege may not be invoked as to corporate records, but may be

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3 The government contended below that, because the subpoenaed documents had been delivered to Mr. Senft's attorneys directly by an SFI employee, they had been "abandoned" by SFI and therefore no privilege could be asserted with respect to them. Because the District Court held that Mr. Senft could not claim the Fifth Amendment privilege as to SFI documents, neither it nor the Court of Appeals addressed the government's contention. In view of the uncontradicted facts concerning how the documents were obtained by Mr. Senft's attorneys, the contention that the documents were abandoned and that the privilege has been vitiated by the purported abandonment is without merit. *See United States* v. *Beattie*, 541 F.2d 329, 331 (2d Cir. 1976) ("We do not read *Fisher*. . . . as detracting from the principle that the Fifth Amendment protects against compulsory production of a paper written by an accused with respect to his own affairs . . . and now in his possession, even though he may have previously sent it to another with the expectation that the latter would retain it.").

asserted successfully to resist compliance with a subpoena calling for records of a sole proprietorship business. *Compare Grant* v. *United States*, 227 U.S. 74, 79-80 (1913) *and Hair Industry, Ltd.* v. *United States*, 340 F.2d 510, 511 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965) *with Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974) *and In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 330 (3d Cir. 1982).

Such a clear-cut rule does not, however, exist for records of a partnership. In *Bellis* v. *United States*, 417 U.S. 85 (1974), where this Court squarely addressed the issue of the applicability of the Fifth Amendment privilege to partnerships, the Court expressly declined to announce a per se rule against application of the privilege to records of all partnerships. Rather, the Court focused primarily on two factors it believed significant under the circumstances of that case: first, that the partnership there had "an established institutional identity independent of its individual partners," *id.* at 95, and, "[e]qually important, . . . [that] it [was] fair to say that petitioner [was] holding the subpoenaed partnership records in a representative capacity." *Id.* at 97. In applying those factors to the circumstances of the case before it, the Court took particular note of certain specific facts:

> It should be noted also that petitioner was content to leave these records with the other members of the partnership at their principal place of business for more than three years after he left the firm. Moreover, the Government contends that the other partners in the firm had agreed to turn the records over to the grand jury before discovering that petitioner had removed them from their offices, and that they made an unavailing demand upon petitioner to return the records. . . . [T]his provides additional support for our conclusion that it is the organizational character of the records and the representative aspect of petitioner's present possession of them which predominates over his belatedly discovered personal interest in them.
>
> —*Id.* at 99-100.

Thus, while the Court considered the "established institutional identity" of the partnership to be a relevant factor, it was "in the circumstances of this case, petitioner's possession of the partnership's financial records in what can be fairly said to be a representative capacity [that] compel[led] [the Court's] holding" that the privilege was inapplicable. *Id.* at 101. Significantly, the Court expressly noted that "[t]his might be a different case if it involved a small family partnership, see *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D.N.Y. 1972)."[4]

Petitioners conceded below that SFI has an established institutional identity, the first part of the *Bellis* test, but demonstrated that the District Court erred in applying *Bellis* by completely ignoring the second—and decisive—criterion established by this Court: whether it can fairly be said that the documents sought are held in a representative capacity by the person invoking the privilege. This factor was the determina-

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4 In *Slutsky*, the case cited by the *Bellis* Court, the government sought to compel the production of the business records of the Nevele Country Club for use at the criminal trial of its owners, Ben and Julius Slutsky (the "Slutsky Brothers"). 352 F. Supp. at 1106. The Slutsky Brothers, who operated the multi-million dollar resort as a partnership, claimed that compulsory production of the Nevele records would violate their Fifth Amendment privilege against self-incrimination and sought to quash the subpoena. The government argued that because of the size and scope of the business—a hotel and resort with 325 guest rooms on 1,000 acres of land, a payroll of about $1 million, over $4 million in gross receipts, buildings worth about $4.4 million and a convention sales office in New York City—the records sought were not personal and thus not privileged, and sought to enforce the subpoena. 352 F. Supp. at 1106-07.

The court agreed with the Slutsky Brothers and quashed the subpoena. The court held that while a partnership with significantly more members or a partnership consisting of unrelated members might not enjoy a Fifth Amendment privilege (thus foreshadowing the decision in *Bellis* 17 months later), a "small family partnership" such as the Nevele was more akin to a sole proprietorship than to a corporation and thus could not be compelled to produce its records. 352 F. Supp. at 1108. As demonstrated herein, the facts of this case are strikingly similar to those in *Slutsky* and militate in favor of a similar result.

tive one in *Bellis*, as it is likely to be as to all business partnerships, since they will invariably have an "established institutional identity." In other words, the existence of an established institutional identity is a necessary, but not a sufficient, condition to render the privilege inapplicable to partnership documents; in addition, it must be fair to say under the particular circumstances that the documents are held in a representative capacity. That is why the *Bellis* Court recognized that a small family partnership might present a different case warranting a different result and cited *Slutsky*: in a small family partnership, the personal relationship between the partners and their joint personal relationship to the enterprise may be such that it is not fair to say that the firm's documents are held in a representative, rather than a personal, capacity.

The Court of Appeals merely compounded the District Court's misapplication of *Bellis*. Thus, in its summary order, the Court of Appeals did not even address the District Court's failure to determine—as required by *Bellis*—whether the subpoenaed documents were held by Mr. Senft in a representative capacity. Moreover, in conclusorily holding that Mr. Senft "controlled the records in his representative capacity as a general partner of [SFI]," without undertaking the careful factual analysis required by *Bellis*, the Court of Appeals failed to correct the District Court's error.

The errors committed by the courts below are even more apparent when the record facts are examined with respect to whether the subpoenaed SFI documents are held by Mr. Senft in a representative capacity for the limited partners. Petitioners submit that the facts with respect to SFI's creation as a limited partnership and the practical realities of SFI's ownership and control require the conclusion that SFI is Mr. Senft's personal business. The limited partners of SFI—Mr. Senft's daughter and younger brother—do not share control of the firm and have no real financial investment of their own in the firm (the money for their capital contributions was given to them by Mr. Senft). In short, this is not the typical business partnership,

i.e., a vehicle for two or more persons to manage and control their joint business enterprise or for a person to induce unrelated investors to make capital investments with limited liability in his business. Indeed, the documents here are even more personal and less representative in nature than in *Slutsky*, where the two brother partners shared control of the enterprise and, presumably, the financial investments required by it. In this case, SFI is truly the product only of Mr. Senft's entrepreneurial efforts and financial investments; the limited interest in SFI of his daughter and brother are simply gifts from Mr. Senft of small shares of his firm's profits.

Under the circumstances of this case, SFI's documents are in every realistic sense the property of Mr. Senft, and are not held by him in a representative capacity. To remove the Fifth Amendment privilege from what are, for all practical purposes, sole proprietorship documents because the firm's principal gave gifts of small limited partnership interests in the firm to two close relatives, would indeed ignore this Court's admonition in *Bellis* that "the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise." 417 U.S. at 101. Under *Bellis*, the business records of SFI are not held in a representative capacity; Mr. Senft's Fifth Amendment privilege should apply to the documents sought by the grand jury subpoena here.

Conclusion

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: December 30, 1982

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of December, one thousand nine hundred and eighty-two.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE RICHARD J. CARDAMONE,

Circuit Judges.

82-6284

IN RE GRAND JURY SUBPOENA DATED JULY 1982

—and—

SENTINEL FINANCIAL INSTRUMENTS and MICHAEL M. SENFT,
Appellants,

—against—

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted, and the parties were given permission to file supplemental briefs.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. Sentinel Financial Instruments clearly had an institutional identity separate and distinct from Michael Senft. The limited partnership was registered in New York State pursuant to N.Y. Partnership Law § 91, and held itself out as an independent entity. Moreover, the partnership had its own employees, held firm accounts, and possessed other indicia of a separate existence.
2. The documents covered by the subpoena duces tecum served on Wachtell, Lipton, Rosen & Katz were the property of the Sentinel Financial Instruments limited partnership. The materials sought were trading records for a customer of the partnership, and directly related to the business of Sentinel Financial Instruments.
3. The limited partners in Sentinel Financial Instruments had a right to inspect the documents covered by the subpoena. *See* N.Y. Partnership Law § 99, *Millard* v. *Newmark*, 24 A.D.2d 333 (1966). The records were also available to employees of the partnership.
4. Michael Senft controlled the records in his representative capacity as a general partner of Sentinel Financial Instruments. He had no personal right to possession or control of the documents. Accordingly, Senft may not assert a Fifth Amendment privilege against self-incrimination concerning the production of the documents to the grand jury. *Bellis* v. *United States*, 417 U.S. 85 (1974).
5. The order is affirmed.

/s/ Irving R. Kaufman

IRVING R. KAUFMAN,

/s/ William H. Timbers

WILLIAM H. TIMBERS,

/s/ Richard J. Cardamone

RICHARD J. CARDAMONE,

Circuit Judges.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M11-188

In re GRAND JURY SUBPOENAS ADDRESSED TO SENTINEL FINANCIAL INSTRUMENTS and WACHTELL, LIPTON, ROSEN & KATZ.

OPINION

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TENNEY, J.

This is a motion under Federal Rule of Criminal Procedure 17(c) by Sentinel Financial Instruments ("SFI") and Michael Senft ("Senft"), a principal of SFI, to quash grand jury

subpoenas requiring the production of SFI business documents. The subpoenas were served on SFI and Wachtell, Lipton, Rosen & Katz ("Wachtell, Lipton"), SFI's counsel. The movants claim that Senft is entitled to assert his Fifth Amendment privilege against self-incrimination to immunize SFI's records from production and that the documents in possession of Wachtell, Lipton are protected by the attorney-client privilege.

For the reasons stated below, the motion to quash the subpoenas is denied.

Background

SFI is a limited partnership created pursuant to New York law (N.Y. Partnership Law § 91 (McKinney 1948) (hereinafter N.Y. Partnership Law)). It acts primarily as a broker-dealer in the trading of government securities. The firm is a registered broker-dealer in New York State and employs approximately twenty individuals. SFI and Senft, SFI's sole general partner, are currently targets of a grand jury investigation. As a consequence, SFI and Wachtell, Lipton were served with subpoenas requiring the production of SFI documents. By the present motion they seek to quash the subpoenas. With regard to the subpoena served on SFI, Senft contends that he should be able to assert his Fifth Amendment privilege against self-incrimination to shield the documents from the purview of the grand jury. He argues that, since he controls the management of SFI and owns 98% of the company, it is, in effect, a sole proprietorship. Alternately, he argues that SFI is a small family partnership that may be treated as a sole proprietorship under the relevant case law.

In support of these arguments he points out that SFI consists only of himself and two limited partners, the Jenifer E. Senft Trust and David Senft. Jenifer is Senft's daughter and David is his brother. Senft owns a 98% interest in the losses and profits of the business. Each of the limited partners owns a 1% interest in SFI's profits. By law, their losses are limited to their capital contribution. N.Y. Partnership Law § 106.

The government, on the other hand, contends that SFI is a limited partnership with a separate institutional identity and, therefore, is not entitled to assert the general partner's privilege against self-incrimination.

With regard to the subpoena served on Wachtell, Lipton, the movants argue that the documents in Wachtell, Lipton's possession are protected by the attorney-client privilege. The government, however, contends that the privilege does not apply since the documents are not covered by Senft's personal privilege and, even if they were, the documents in the hands of Wachtell, Lipton were received from a third party thus precluding the application of the attorney-client privilege.

Discussion

The Fifth Amendment privilege against self-incrimination is purely a personal privilege, *Bellis v. United States*, 417 U.S. 85, 87 (1974); *Couch v. United States*, 409 U.S. 322, 328 (1972); *United States v. White*, 322 U.S. 694, 698 (1944), and does not extend to individuals who possess records of an organization in a representative capacity. *Bellis*, *supra*, 417 U.S. at 89; *United States v. White*, *supra*, 322 U.S. at 699-700 (1944). Therefore, officers of incorporated or unincorporated associations may not claim the privilege to preclude the production of records pursuant to a grand jury subpoena. *Bellis*, *supra*; *United States v. White*, *supra*; *Wilson v. United States*, 221 U.S. 361 (1911); *Dreier v. United States*, 221 U.S. 394 (1911). Even the smallest of corporations—those consisting of only one shareholder—may not rely on the Fifth Amendment privilege to shield its records from a government investigation. *Hair Industry, Ltd. v. United States*, 340 F.2d 510 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965).

On the other hand, an individual, as a sole proprietor, may withhold his business records from a grand jury investigation if he asserts his Fifth Amendment privilege. *Bellis*, *supra*, 417 U.S. at 87-88; *Grand Jury Subpoena Duces Tecum Dated April 23, 1981 Witness v. United States*, 657 F.2d 5, 8 n.1 (2d Cir. 1981); *United States v. Beattie*, 541 F.2d 329, 331 (2d Cir.

1976). Indeed, the privilege may be invoked by a sole proprietor of a business without regard to the size or complexity of the business. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 330 (3d Cir. 1982); *In re Grand Jury Subpoena*, 646 F.2d 963, 968-69 (5th Cir. 1981).

Whether a partnership should be treated like a corporation or like a shared sole proprietorship for Fifth Amendment purposes was an unsettled question until the Court decided *Bellis v. United States*, *supra*. In *Bellis* an individual partner of a three member law firm attempted to protect partnership records in his possession from the purview of a grand jury by asserting his privilege against self-incrimination. *Bellis v. United States*, *supra*, 417 U.S. at 86. He argued that the small firm did not constitute an entity separate from the individual partners. The Court held that where a partnership has "an established institutional identity independent of its individual partners," *id.* at 95, an individual partner may not withhold subpoenaed documents of the partnership that he holds in his representative capacity. *Id.* at 95-97. To determine if the partnership had a separate identity, distinct from its individual members, the Court looked to a number of factors. These included the fact that the firm was not an informal or temporary arrangement, had "a bank account in the partnership name, had stationery using the firm name on its letterhead, and in general, held itself out to third parties as an entity with an independent institutional identity." *Id.* at 96-97. The Court also noted that the partnership employed two other attorneys, who were not members of the partnership, that it filed separate partnership returns for federal tax purposes, and that "[s]tate law permitted the firm to be sued . . . and hold title to property. . . in the partnership name, and generally regarded the partnership as a distinct entity for numerous purposes." *Id.* at 97 (citations omitted).

Applying the above criteria, SFI clearly has an established institutional identity separate from its individual partners. SFI is a limited partnership formed under New York state law; it is registered as a broker-dealer doing business in New York. Affidavit in Opposition to Motion to Quash of Kevin

McLaughlin, sworn to August 18, 1982 ("McLaughlin Aff.") ¶ 2. In 1980, the firm employed approximately twenty individuals, some of whom were traders, and served about two hundred customers. *Id.* at ¶¶ 4, 6, 9. It has its own stationery with the firm letterhead. *Id.* at ¶ 8. The firm maintained two bank accounts, filed partnership income tax returns for 1979 and 1980, *id.*, ¶¶ 7, 12, and had substantial assets. Reply Affidavit of Faith Colish, sworn to August 23, 1982 ¶ 3. In addition, SFI has purchased material under its business name and has received fees from another firm for the use of its space and staff. McLaughlin Aff. at ¶¶ 8, 10. Moreover, Senft and SFI were to be two separate general partners in a new limited partnership that Senft was organizing. *Id.*

Movants argue that these facts are irrelevant in determining whether the Fifth Amendment privilege is available to Senft and merely divert the Court's attention from precedent squarely supporting their motion. They contend that unless this Court is prepared to overturn *United States v. Slutsky*, 352 F. Supp. 1105 (S.D.N.Y. 1972), the subpoenas must be quashed. Reply Memorandum of Law in Support of the Motion by Sentinel Financial Instruments and Michael M. Senft to Quash Subpoenas ("Reply Memorandum") at 1.

In *Slutsky*, the government sought to compel the production of business records of a two-man family partnership. The partners, Ben and Jule Slutsky, were brothers who operated a resort known as the Nevele Country Club. *United States v. Slutsky*, *supra*, 352 F. Supp. at 1107. The club consisted of a multi-million dollar hotel operation, with a number of employees, that was managed by the Slutskys and their two sons, all of whom lived on the premises. *Id.*

The court in *Slutsky* stated that, in determining whether a partnership more closely resembles a sole proprietorship or a corporation, the "focus [should be] placed on the extent and nature of the ownership group." *Id.* at 1108. On the facts of that case, the court held that a two-man "family partnership is not so impersonal in the scope of its membership and activities that it can not represent the purely private or personal interests of its constituents." *Id.* Accordingly, the court found that the

defendants' Fifth Amendment privilege against self-incrimination was available and denied the government's motion. *Id.* at 1109.

The movants, citing the Supreme Court's dictum in *United States v. Bellis*, *supra*, that there "might be a different case if [the partnership] involved a small family partnership," *supra*, 417 U.S. at 101 (citing *United States v. Slutsky*, *supra*), argue that *Slutsky* is still good law and that, if this Court focuses on the nature of the ownership group and control of the partnership, it will find that SFI epitomizes the type of small family partnership that the Court was referring to in *Bellis*. Reply Memorandum at 1, 4.

However, the cases since *Bellis* have invariably relied on a factual examination of organizational activity, rather than focusing on the extent and nature of the ownership group, to determine if the records of a small family partnership may be protected by the Fifth Amendment privilege. *E.g.*, *United States v. Mahady & Mahady*, 512 F.2d 521, 523-24 (3d Cir. 1975) (four-brother law firm partnership); *In re September 1975 Special Grand Jury*, 435 F. Supp. 538, 543-46 (N.D. Ind. 1977) (husband and wife partnership treated as separate entity with letterhead and separate tax return); *United States v. Hankins*, 424 F. Supp. 606, 615 (N.D. Miss. 1976), *aff'd in part and rev'd in part*, 565 F.2d 1344, 1349 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (two-brother partnership with structured business, numerous employees and substantial assets).

Hence, a factual examination of an organization's activities is not a mere diversion from judicial precedent, as the movants argue. The facts relating to SFI's activities are similar to those examined in the above cases and in *Bellis v. United States*, *supra*, 417 U.S. at 95-100. They are certainly relevant to the instant case.

Moreover, *United States v. Slutsky*, *supra*, is factually distinguishable from this case, and *Slutsky's* continued vitality, in view of the test established in *Bellis*, is an issue this Court need not resolve. In *Slutsky* the court stressed that the partners gave their personal attention to the day-to-day business operations,

lived on the premises, were familiar with the bookkeeping and accounting practices of the organization, and were the only ones, along with their sons, who could sign checks. *United States v. Slutsky, supra*, 352 F. Supp. at 1108. SFI, on the other hand, authorized employees to draw checks and had a corporate-like structure with an executive vice president, chief financial and operations officer, and a controller. McLaughlin Aff. at ¶¶ 6, 7. This type of organization makes it highly unlikely that Senft was familiar with the day-to-day operations or the bookkeeping and accounting practices of SFI.

More significant is that SFI is a limited partnership formed under the statutory criteria of New York law, N.Y. Partnership Law § 91, while the partnership in *Slutsky* was a general partnership. The courts have found limited partnerships, being creatures of the legislature, to be more like corporations than general partnerships.[1] *United States v. Silverstein*, 314 F.2d 789 (2d Cir.), *cert. denied*, 374 U.S. 807 (1963); *Lynn v. Cohen*, 359 F. Supp. 565 (S.D.N.Y. 1973).

Nevertheless, movants, relying on a statement in *Bellis* that "the applicability of the [Fifth Amendment] privilege should not turn on an insubstantial difference in the form of the business enterprise," Reply Memorandum at 3 (quoting *Bellis v. United States, supra*, 417 U.S. at 101), argue that this Court would be unjustly putting form over substance in classifying SFI as a partnership instead of a sole proprietorship. Movants acknowledge that SFI is technically a limited partnership but contend that it should be considered a sole proprietorship since Senft owns 98% of the business and, as the only general partner, has complete control over the management and policy making of SFI. Memorandum of Law in Support of the Motion by Sentinel Financial Instruments and Michael M. Senft to Quash Subpoenas ("Movants' Memorandum") at 4.

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1 For example, derivative actions on behalf of an organization may be brought by limited partners, N.Y. Partnership Law § 115-a (McKinney Supp. 1981), and by corporate stockholders, N.Y. Bus. Corp. Law § 626 (McKinney 1963).

This argument is not persuasive. First, SFI is not a sole proprietorship; it has executed and filed a formal partnership agreement pursuant to New York law. McLaughlin Aff. ¶ 2. Second, the *Bellis* Court, in noting that an insubstantial difference in the form of a business organization should not determine the availability of the Fifth Amendment privilege, was addressing the question whether the partnership form, which is a shared proprietorship, should preclude the Court from treating the partnership like a corporation for Fifth Amendment purposes. The Court held that it did not. *Bellis v. United States*, *supra*, 417 U.S. at 101. Third, the Court did not reject the importance of the form of a business enterprise in assessing the availability of the privilege and noted that even one-man corporations—which often closely resemble sole proprietorships—may not avail themselves of the privilege. *Bellis v. United States*, *supra*, 417 U.S. at 100 (citing *Grant v. United States*, 227 U.S. 74 (1913); *Fineberg v. United States*, 393 F.2d 417 (9th Cir. 1968); *Hair Industry, Ltd. v. United States*, 340 F.2d 510 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965)). Indeed, the Court stated that "the existence of a formal partnership agreement would merely reinforce our conclusion that the partnership is properly regarded as an independent entity with a relatively formal organization." *Bellis v. United States*, *supra*, 417 U.S. at 96 n.4.

The *Bellis* Court noted that the policy considerations underlying the Fifth Amendment privilege, which make the privilege unavailable for records of a collective entity, reflect not only the "view that the privilege against self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records,' " *Bellis v. United States*, *supra*, 417 U.S. at 89-90 (citing *United States v. White*, *supra*, 322 U.S. at 701), but also an interrelated policy, "the protection of an individual's right to a 'private enclave where he may lead a private life,' " *id.* at 91 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)). This second policy consideration indicates that the form a business organization takes can often be decisive in determining whether the Fifth Amendment

privilege is available to the individual members. An organized entity often loses its claim to privacy and confidentiality since access to its records is controlled by statute or by the organization's own by-laws. *Bellis v. United States*, *supra*, 417 U.S. at 92.

Once Senft created SFI as a limited partnership, with himself as general partner and the Jenifer E. Senft Trust, and later David Senft, as limited partners, he necessarily lost all claims to privacy and confidentiality that may have attached to a sole proprietorship, or possibly, to a small family general partnership.[2] The limited partnership was not "an association of two or more persons to carry on as co-owners a business for profit." N.Y. Partnership Law. § 10(1). The limited partners have no authority over how SFI is operated; Michael Senft has sole managerial authority. Movants' Memorandum at 4; see also N.Y. Partnership Law § 99. The interests of Senft and those of the Jenifer E. Senft Trust and David Senft are not identical.[3] Moreover, Senft, as statutory custodian of SFI's records, N.Y. Partnership Law § 99, "lacks the control over their content and location and the right to keep them from the view of others which would be characteristic of a claim of privacy and confidentiality." *Bellis v. United States*, *supra*, 417 U.S. at 92.

Clearly SFI is not a sole proprietorship nor is it a small family partnership that should be treated like a sole proprietorship for Fifth Amendment purposes. SFI has an established institutional identity, and Senft is not entitled to assert his

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2 In reality, Burton G. Lipsky, as trustee for the Jenifer E. Senft Trust, is the limited partner. It is questionable whether a partnership that includes an unrelated trustee is a family partnership since neither the trust nor the trustee is a family member.

3 Most explicitly, the trustee's prime obligation is to see that the trust receives its share of SFI's profits. *See Pyler v. Pyler*, 137 App. Div. 568, 122 N.Y.S. 256 (1st Dep't), *aff'd*, 199 N.Y. 538, 92 N.E. 1099 (1910). If the trustee doubts that the trust is receiving its fair share, he has a statutory right to ". . . a formal account of partnership affairs whenever circumstances render it just and reasonable." N.Y. Partnership Law § 99(1)(b).

privilege against self-incrimination to keep the subpoenaed records from the grand jury.

Since the records of SFI are not privileged while in the possession of Senft, they are not privileged in the hands of Wachtell, Lipton,[4] and the movants may not rely on the attorney-client privilege to prevent production of the SFI records. *Fisher v. United States*, 425 U.S. 391, 403; *Grand Jury Subpoena Duces Tecum Dated April 23, 1981 Witness v. United States*, *supra*, 657 F.2d at 8 n.1.

For the reasons stated above the motion is denied.

So ordered.

Dated: New York, New York
October 18, 1982

/s/ Charles H. Tenney
U.S.D.J.

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4 The Court, therefore, need not determine if the privilege applies when an attorney receives a client's documents from a third person.